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# Extending Weingarten to the Nonunion Setting: A History of Oscillation

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# EXTENDING WEINGARTEN TO THE NONUNION SETTING: A HISTORY OF OSCILLATION

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## I. INTRODUCTION

A recent National Labor Relations Board (hereinafter NLRB) decision has focused much attention on the impact of the National Labor Relations Act (hereinafter NLRA),<sup>1</sup> in the non-union context. The NLRB's decision in the matter of *Epilepsy Foundation of Northeast Ohio*<sup>2</sup> (hereinafter *Epilepsy*) overturned its fifteen year old precedent and extended *N.L.R.B. v. J. Weingarten, Inc.*<sup>3</sup> (hereinafter *Weingarten*) rights to employees in the non-union setting. This right allows an employee to have a co-worker representative present during investigatory interviews with the employer. Management attorneys read the opinion with disbelief and fear of the effect that this decision would have on their non-union, employer clients. The irony of the situation is that the decision to extend *Weingarten* rights to non-union employees was grounded in the NLRA, which has had such little impact in the non-union setting that those who are most affected by this decision are completely unaware of the Act on which the decision was based.<sup>4</sup>

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<sup>1</sup>29 U.S.C. §§ 151-69 (1994).

<sup>2</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 (2000).

<sup>3</sup>The term *Weingarten* rights comes from the Supreme Court decision that established the right, *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. (1975).

<sup>4</sup>See John D. Canoni, *Non-Union Employees are Entitled to Have a Coworker Present at Investigatory Interviews*, NIXON PEABODY LLP PUBLICATIONS (July 18, 2000), at [http://www.nixonpeabody.com/publications\\_new\\_fulltext.asp?ID=722&BACK=attorneys\\_new\\_bio.asp?ID=598](http://www.nixonpeabody.com/publications_new_fulltext.asp?ID=722&BACK=attorneys_new_bio.asp?ID=598); Jack, Lyon & Jones, P.A., *NLRB Makes Sweeping Changes for Nonunion Employers*, ARK. EMP. LAW LETTER, Sept. 2000, at 1; Susan J. McGolrick, *Attorneys Disagree About the Wisdom of NLRB Extending Weingarten Rights*, DAILY LABOR REPORT, August 7, 2000, at 1-2.

Passed in response to the nineteenth century hostility towards union activity, the NLRA traditionally was viewed as a pro-union statute.<sup>5</sup> However, as much as the Act contains provisions clearly aimed at protecting union activity, the Act explicitly applies to non-union employees as well as union employees.<sup>6</sup> Nevertheless, many nonunion employers and employees are unaware of the existence of the NLRA despite it being the only law governing the relationship between an employer and its employees as a group in most private sector establishments in this country.<sup>7</sup> This ignorance places non-union employers in an especially precarious position given the recent *Epilepsy*<sup>8</sup> decision by National Labor Relations Board,<sup>9</sup> which was upheld by the United States Court of Appeals for the D.C. Circuit.<sup>10</sup>

This Note analyzes the conflicting history surrounding this issue and asserts that the necessary pre-requisites of section 7 (hereinafter § 7) of the NLRA are not satisfied when the *Weingarten* right is extended to the nonunion setting. The Note will begin the discussion with an analysis of *Weingarten*, the Supreme Court case that established *Weingarten* rights in the union setting.<sup>11</sup> Next, the competing NLRB decisions regarding whether *Weingarten* should be extended to the nonunion setting will be set forth. Having set the stage, the discussion will turn to the definition of protected concerted activity within the meaning of the NLRA, specifically within the meaning of § 7 of the NLRA. The Note will then argue that the essential elements of concertedness and the mutuality are not met when only one employee in the nonunion setting is acting in relation to the employer during an investigatory meeting. As a result, this Note concludes that the Board erroneously grounded its *Epilepsy* decision on the practical consequences of its decision rather than a sufficient showing of concerted activity and mutuality when one nonunion employee, involved in an investigatory meeting with the employer, seeks the aid of a fellow employee.

## II. THE SUPREME COURT'S *WEINGARTEN* DECISION

The right of employees to have a representative present during an investigatory meeting arose when the Supreme Court upheld the Board's establishment of such a right in *Weingarten*.<sup>12</sup> The case began with an in-house investigation of one of the

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<sup>5</sup>American Hospital Association v. NLRB, 899 F.2d 651 (7th Cir. 1990) ("The statute, though otherwise nondirective, can be read to suggest that the tilt should be in favor of unions . . . the principal purpose of the Act was and is to protect workers who want to organize for collective bargaining.").

<sup>6</sup>Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1508 (8th Cir. 1993).

<sup>7</sup>Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675-76 (1989).

<sup>8</sup>*Epilepsy Found. of Northeast Ohio*, 2000 NLRB LEXIS at 428.

<sup>9</sup>Oral arguments were scheduled for October 2, 2001 before the U.S. Court of Appeals for the D.C. Circuit.

<sup>10</sup>See *Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001).

<sup>11</sup>*J. Weingarten, Inc.*, 420 U.S. at 251.

<sup>12</sup>*Id.*

employer's workers regarding the suspected theft of food from the employer.<sup>13</sup> The employer conducted an interview and multiple times throughout the interview, the employee asked the manager for her union shop steward or some other union representative to be called to the interview.<sup>14</sup> Her requests were denied and during the course of the interview, the employee explained why it appeared as though she was stealing food from the company while in fact she was not.<sup>15</sup> Although the employee was not found to be stealing, the employee implicated herself for eating "free lunches" while at work.<sup>16</sup>

Accordingly, the store manager closely interrogated the employee about these apparent violations of store policy.<sup>17</sup> The employee again asked that her shop steward be called to the interview and again, her request was denied.<sup>18</sup> Based on the interview, a written statement, which included a computation of \$160 for the employee to pay back to the company, was drafted.<sup>19</sup> The employee refused to sign the statement and after detailing the incident to her shop steward, filed an unfair labor practice (hereinafter "ULP") charge with the NLRB.<sup>20</sup>

The Board held, consistent with its prior decisions,<sup>21</sup> that the employer's denial of the employee's request for union representation at the investigatory meeting constituted a ULP under § 8(a)(1) of the NLRA because it interfered with the employee's § 7 right to engage in concerted activities for mutual aid or protection.<sup>22</sup>

It is important to note that as much as the *Weingarten* Board affirmed its prior construction of § 7, which created the right for a union employee to request and obtain representation at certain investigatory interviews, it also affirmed the limitations that prior Board decisions placed on such a right.<sup>23</sup> First, the employee must request the representation; and an employer does not have an obligation to

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<sup>13</sup>*Id.* at 251.

<sup>14</sup>*Id.* at 254.

<sup>15</sup>*Id.* at 254-55.

<sup>16</sup>*Weingarten, Inc.*, 420 U.S. at 254-55.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 255.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 256.

<sup>21</sup>The Board first announced that its construction of § 7 "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline" in *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198-99 (1972). Accordingly, the Board held that when an employer denies this request, it is committing an 8(a)(1) violation. *Id.* at 199. Section 8(a)(1) states: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1994).

<sup>22</sup>*J. Weingarten, Inc.*, 420 U.S. at 251.

<sup>23</sup>*J. Weingarten, Inc.*, 202 N.L.R.B. 446, 449 (1973) (noting that the Board was applying the principles enunciated in *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972) and *Mobil Oil Corp.*, 196 N.L.R.B. 144 (1972).

inform the employee of this right.<sup>24</sup> Second, this right is only triggered in situations where the employee reasonably believes that the investigation will result in disciplinary action.<sup>25</sup> Third, an employer can refuse the request without any justification or explanation.<sup>26</sup> However, if the employee refuses to submit to an interview without representation, the employer must cancel the interview because it cannot force the employee to participate in the interview without representation.<sup>27</sup> Fourth, the employer does not have to bargain with the representative attending the investigatory interview.<sup>28</sup>

When the Court of Appeals for the Fifth Circuit reviewed the Board's decision that a violation of § 8(a)(1) resulted from the denial of the employee's request for union representation at an investigatory meeting, it refused to enforce the Board's cease and desist order.<sup>29</sup> The Supreme Court then granted certiorari.<sup>30</sup> In upholding the Board's decision, the Supreme Court found that "the action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that 'employees shall have the right to engage in concerted activities for the purpose of mutual aid or protection.'"<sup>31</sup> The court further found that when an employer interferes with an employee's right to request union representation at an investigatory interview, it is a violation of § 8(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in exercising the rights guaranteed in § 7.<sup>32</sup>

The Court very clearly stated the premises on which it was basing this right to request assistance in such meetings. First, the Court stated that the union representative safeguarded not only the interests of the employee being investigated, but also the interests of the entire bargaining unit.<sup>33</sup> Second, the Court found that the

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<sup>24</sup>See *Mobil Oil Corp.*, 196 N.L.R.B. at 1052.

<sup>25</sup>See *Quality Mfg. Co.*, 195 N.L.R.B. at 198-199.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 260. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." *Id.* (citing the Brief for Petitioner at 22, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)).

<sup>29</sup>The Court of Appeals agreed with the Company's reliance on "a long line of Board decisions, each which indicates – either directly or indirectly – that no union representative need be present [at an investigatory interview]." *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1137 (5th Cir. 1973) (citing *Illinois Bell Telephone Co.*, 192 N.L.R.B. 138 (1971); *Texaco, Inc., Los Angeles Terminal*, 179 N.L.R.B. 976 (1969); *Wald Manufacturing Co.*, 176 N.L.R.B. 839 (1970); *aff'd*, 426 F.2d 1328 (6th Cir. 1970); *Dayton Typographic Service, Inc.*, 176 N.L.R.B. 359 (1969); *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 84 (1968); *Chevron Oil Co.*, 68 N.L.R.B. 574 (1967); *Dobbs House, Inc.*, 145 H.L.R.B. 1565 (1964)).

<sup>30</sup>*J. Weingarten, Inc.*, 420 U.S. at 251.

<sup>31</sup>*Id.* at 260 (quoting *Mobil Oil Corp. v. NLRB*, 482 F.2d 842 (7th Cir. 1973)).

<sup>32</sup>29 U.S.C. § 158(a)(1) (1994).

<sup>33</sup>*J. Weingarten, Inc.*, 420 U.S. at 260.

representative's presence assured other employees that they could also seek representation if called upon to attend a like interview.<sup>34</sup> The Court went on to lay out two more justifications for upholding the Board's decision. First, the Court found the Board's construction to "plainly effectuate the most fundamental purposes of the Act."<sup>35</sup> Second, the Court found the Board's construction to give recognition to the right when it is most useful to both employee and employer on account of the expertise of the union representative.<sup>36</sup> Namely, the union representative's presence may help bring about resolution of the problem at the investigatory stage and prevent the filing of a grievance.

After laying out these justifications, the Court so clearly established what has been named the *Weingarten* right for union employees that it has survived unscathed for almost thirty years. However, the Court did not address the issue of whether the right was also present in the nonunion setting.<sup>37</sup>

### III. COMPETING DECISIONS OF THE NLRB AS TO WHETHER *WEINGARTEN* SHOULD BE EXTENDED TO THE NON-UNION SETTING

In the years following *Weingarten*, the Board has not been consistent in its determination as to whether the *Weingarten* right should be extended to the nonunion setting. Seven years after *Weingarten*, in the case of *Materials Research Corp.* (hereinafter *Materials Research*),<sup>38</sup> the Board concluded that the Court's *Weingarten* opinion did not call for a restrictive interpretation of § 7 and it extended the right to representation during an investigatory meeting to the nonunion setting.<sup>39</sup> When *Materials Research* was decided, the Board was composed of three Carter appointees and two Reagan appointees.<sup>40</sup> The three Carter hold-overs voted in favor of extending *Weingarten*, while the two Reagan appointees dissented from the opinion.

The majority members' analysis of whether a nonunion employee is entitled to the *Weingarten* right began with the premise that the right "emanates from the employee's rights guaranteed by Section 7"<sup>41</sup> as opposed to the union's rights

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<sup>34</sup>*Id.* at 261.

<sup>35</sup>*Id.* "Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate." *Id.* at 262.

<sup>36</sup>*Id.* "A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *J. Weingarten, Inc.*, 420 U.S. at 263.

<sup>37</sup>"This case left many questions unanswered, one of which was whether section 7 affords unorganized employees the same representational right enjoyed by their union counterparts." Jill D. Flack, *Limiting the Weingarten Right in the Nonunion Setting: The Implications of Sears, Roebuck and Co.*, 35 CATH. U. L. REV. 1033, 1035 (1986).

<sup>38</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 (1982).

<sup>39</sup>*Id.* at \*13, \*18.

<sup>40</sup>See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361 (2000) (appendix).

<sup>41</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 at \*7.

guaranteed by Section 9 (hereinafter § 9).<sup>42</sup> Citing the limitations that the Court placed on the role of the *Weingarten* representative,<sup>43</sup> the majority noted that the representative could not possibly be acting in a collective-bargaining capacity during such a meeting, and § 9 is only triggered in a collective bargaining scenario.<sup>44</sup> Accordingly, the majority concluded that there can be no doubt that the Court protected the *Weingarten* right under § 7 as opposed to § 9.

After concluding that the Court did not protect the *Weingarten* right as one belonging to the union under § 9, the majority in *Materials Research* addressed why it appeared as though the Court placed much stock in the role of the union representative in its analysis. The majority noted that the Court found the employee seeking assistance to have an immediate stake in the outcome of the interview, while the union representative had broader purposes that went beyond the immediate concern of the individual employee.<sup>45</sup> These broader purposes were: (1) safeguarding the interests of all the employees in the bargaining unit and (2) reassuring all employees in the bargaining unit that if they were to be subjected to a similar interview, they also could seek the assistance of a representative.<sup>46</sup>

The *Materials Research* majority seemed to accept that these functions of the representative were central to the finding of § 7 protected activity in *Weingarten*. However, the majority contended that these functions did not belong exclusively to union representatives.<sup>47</sup> While recognizing that the Court framed its discussion in terms of the role of a “union representative,” the majority found such language to merely be a reflection of the facts of the case: “that terminology...was utilized because it accurately depicted the specific fact pattern presented . . . not because the Court intended to limit the right recognized in *Weingarten* only to unionized employees.”<sup>48</sup> Thus, the majority endorsed a broad interpretation of the Court’s use of “union representative” so as to include a nonunion, co-worker representatives.

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<sup>42</sup>Section 9 of the Act states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit *for purposes of collective bargaining* in respect to rates of pay, wages, hours of employment or other conditions of employment.” 29 U.S.C. 159(a) (1994) (emphasis added).

<sup>43</sup>Specifically, the majority referred to how “the Court carefully differentiated [between] the role assigned to a representative at an investigatory interview from that of a collective-bargaining representative acting in its representative capacity.” *Materials Research Corp.*, 262 N.L.R.B. 1010 at \*11. The majority noted three particular limitations that the Court placed on the *Weingarten* representative that distinguish him from a collective bargaining representative: (1) the *Weingarten* representative is simply to act as an assistant in clarifying facts; (2) the employer can cancel the meeting altogether and (3) the employer is under no duty to bargain with the representative during the meeting. *Id.*

<sup>44</sup>*Id.* at \*11.

<sup>45</sup>*Id.* at \*7.

<sup>46</sup>*Id.* at \*7-8.

<sup>47</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 at \*22-23.

<sup>48</sup>*Id.* at \*9.

In a similar vein, the *Materials Research* majority went on to note that the protection afforded under § 7, does not vary between union and nonunion settings.<sup>49</sup> The majority seemed to place far more weight in the fact that the Court grounded the right in § 7 rather than in the fact that the Court focused on “union representation.” In other words, the majority seemed to ask how the Court could have intended to limit its *Weingarten* decision to a union setting if it based that decision on a provision that is equally applicable in a nonunion setting.<sup>50</sup>

The majority then discussed the fundamental purposes of the NLRA: the elimination of the inequality in bargaining power between employers and employees.<sup>51</sup> The majority held that requiring a lone employee to attend an investigatory interview that may lead to discipline perpetuates the inequality that the Act was designed to eliminate.<sup>52</sup> Furthermore, the majority found that the inequality of such a scenario is magnified in the nonunion setting because nonunion employees do not have either a collective bargaining agreement or a grievance arbitration procedure, which provide a set of checks and balances on the employer.<sup>53</sup> Thus, the majority asserted that the concern of the Court in *Weingarten* to give union employees “some measure of protection against unjust employer practices”<sup>54</sup> should be just as great, if not greater, in a nonunion setting.

The *Materials Research* majority concluded its analysis by discussing how a co-worker representative, in comparison to a union representative, could just as easily effectuate the underlying purpose of *Weingarten* to “prevent an employer from overpowering a lone employee.”<sup>55</sup> The majority asserted that the Court so limited the actions of a *Weingarten* representative that any co-worker representative could satisfy the role.<sup>56</sup>

The overall scheme of the majority’s argument seems to be that: (1) the Court established the *Weingarten* right under § 7, which is equally applicable in the nonunion setting as the union setting; (2) the inequalities that the Court was concerned with minimizing by means of the *Weingarten* right are all the more severe in the nonunion setting, and (3) the contours of the role of the *Weingarten* representative are such that a co-worker representative could just as easily fulfill the role as a union representative.

Chairman Van De Water took issue with several of the majority’s arguments and dissented from the majority’s decision to extend the *Weingarten* right to nonunion setting.<sup>57</sup> Similar to the majority, Van De Water began his opinion with an analysis

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<sup>49</sup>*Id.* at \*13.

<sup>50</sup>“While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized ... also exists in the absence of a recognized union.” *Id.* at \*13-14 (citing Powell’s dissent in *Weingarten*).

<sup>51</sup>*Id.* at \*19.

<sup>52</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 at \*19.

<sup>53</sup>*Id.* at \*19-20.

<sup>54</sup>*Id.* at \*20.

<sup>55</sup>*Id.* at \*21.

<sup>56</sup>*Id.* at \*22-23.

<sup>57</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 at \*28.



of the interaction between § 7 and § 9. Starting with the premise that the *Weingarten* right must be consistent with all of the provisions of the Act, Van De Water found that an extension to the nonunion setting would be inconsistent with § 9.<sup>58</sup> Noting that § 9 only requires an employer to deal with duly elected representatives,<sup>59</sup> Van De Water concluded that “in the absence of a recognized or certified union, an employer is free to deal with its employees individually.”<sup>60</sup> In direct contrast to the majority’s contention that the *Weingarten* right was one protecting concerted activity, Van De Water viewed the right as one preventing an employer from interfering with an employee’s right to representation by a duly chosen agent.<sup>61</sup> The right that Van De Water spoke of could not, therefore, be present in the nonunion setting because there is no duly chosen agent in that setting.

Van De Water went on to state that not only was the majority giving nonunion employees powers that should be reserved for union representatives, but it was also doing so without imposing the limits and obligations of the Act that bind union representatives.<sup>62</sup> Specifically, the nonunion representative has the power to make suggestions regarding the investigation and forms of discipline, which Van De Water likened to the activities of a labor organization.<sup>63</sup> However, the representative is not at the same time subject to the statutory checks on unions, such as the duty of fair representation.<sup>64</sup>

Van De Water next attacked the majority for setting the investigatory interview apart from other employer/employee confrontations surrounding terms and conditions of employment by only extending the right to representation to the investigatory interview.<sup>65</sup> Van De Water posited that the result of an employer’s discussion with an employee regarding pay scale, safety matters, or work hours might have more of an impact on the employee than the result of a disciplinary interview, yet the employee has no right to a co-worker representative at such meetings.<sup>66</sup> Although Van De Water found no logical distinction between the

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<sup>58</sup>*Id.* at \*29 (Van De Water, dissenting). Section 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit.” 29 U.S.C. §159 (1994).

<sup>59</sup>Section 9(a) of the Act does not specifically state that a nonunion employer can deal with employees individually, but the section only imposes an obligation to deal with the employees via representatives in a union setting. Therefore, the accepted inference is that nonunion employers can deal with employees individually.

<sup>60</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 at \*29 (Van De Water, dissenting).

<sup>61</sup>*Id.* at \*34 n.36 (Van De Water, dissenting).

<sup>62</sup>*Id.* at \*41 (Van De Water, dissenting).

<sup>63</sup>*Id.* at \*40 (Van De Water, dissenting).

<sup>64</sup>*Id.* at \*41 (Van De Water, dissenting). Implicitly, Van De Water was arguing that a “hybrid” representative was created in the sense that the representative is not given labor organization status. Thus, without that status, the representative is not subject to the limitations of §8(b), yet has many of the powers/abilities of a labor organization.

<sup>65</sup>*Materials Research Corp.*, 262 N.L.R.B. 1010 at \*41-42 (Van De Water, dissenting).

<sup>66</sup>*Id.*

investigatory interview and these other “confrontations” in the sense that they all affect the terms and conditions of employment, he hypothesized that the majority of the *Materials Research* Board would not extend the right to representation to these other settings.<sup>67</sup>

Finally, attacking another premise of the majority, Van De Water claimed that there is indeed a distinction between § 7 protection in union and nonunion settings because the presence or absence of a union will determine the extent of the employee’s § 7 rights.<sup>68</sup> Van De Water clarified this statement by explaining that many of the § 7 rights, such as the right to bargain collectively and insist upon a written collective bargaining agreement, only become “operational” with the presence of a union.<sup>69</sup> Van De Water did not assert that union and nonunion employees have different § 7 protections as a matter of fact, but, rather, that some are operational only in the union context due to the status of a recognized bargaining representative.<sup>70</sup>

Member Hunter, the other dissenting member, wrote a very concise opinion consisting of two arguments against the extension of the *Weingarten* right. First, he relied on the Court’s characterization of the unique role of the union representative to protect the interests of the whole bargaining unit and to assure the other employees that they too could obtain assistance if called upon to attend a similar interview.<sup>71</sup> Based on this characterization of the representative, Hunter found that although the employer is under no obligation to bargain with the representative, the *Weingarten* right “flows from the status of the union as collective-bargaining representative.”<sup>72</sup> In the absence of a union, Hunter found that the Court’s justification for the *Weingarten* right was lacking because there is no parallel obligation in the nonunion setting to protect the interests of all employees.<sup>73</sup>

Second, he set forth practical reasons for opposing the majority’s decision: (1) the nonunion employer will be confronted with a “representative” who lacks the skills, responsibilities, and knowledge possessed by union stewards; (2) the representative may be emotionally involved in the interview, and (3) “Pandora’s Box” will be opened.<sup>74</sup>

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<sup>67</sup>*Id.* at \*42.

<sup>68</sup>*Id.* at \*43 (Van De Water, dissenting).

<sup>69</sup>*Id.* \*43-44 (Van De Water, dissenting).

<sup>70</sup>“Although such rights [as the right to collective bargaining and the right to demand a collective bargaining agreement] exist within the framework of section 7, the presence of a union is required to make the rights operational.” *Materials Research Corp.*, 262 N.L.R.B. 1010 at \*43-44.

<sup>71</sup>*Id.* at \*50 (Hunter, dissenting).

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at \*51-52. Hunter’s claim that extending *Weingarten* would open “Pandora’s Box” came out of his observation that the *Weingarten* right, even in the confines of the union setting, had already caused so many struggles for the Board. These struggles arose out of what Hunter characterized as “expansionist Board decisions” that interpreted *Weingarten* in a way that transformed investigatory interviews into adversary proceedings. Hunter found this to be a result that the Court “clearly wished to avoid” and he determined that extending the right to

Only three years after *Materials Research*, the dissenting opinion of Van De Water became the majority opinion when a 3-member Board, consisting solely of Reagan appointees,<sup>75</sup> overturned itself and revoked the extension of *Weingarten* in the case of *Sears, Roebuck and Co.* (hereinafter *Sears*).<sup>76</sup> No members from the *Materials Research* majority participated in *Sears*, and Hunter, who dissented in *Materials Research*, wrote a concurring opinion.

*Sears*, not only reversed *Materials Research*, but also insisted that confining *Weingarten* to the union setting is *compelled* by the Act.<sup>77</sup> Put another way, the *Sears* Board claimed that the Act forbids extending the *Weingarten* right to the nonunion setting. Although the majority opinion in *Sears* claimed to be adopting Chairman Van de Water's dissenting opinion in *Materials Research*,<sup>78</sup> it should be noted that Van De Water never claimed that the Act *compelled* the conclusion that *Weingarten* could not be extended to the nonunion setting.

The *Sears* Board began its analysis by endorsing the Court's *Weingarten* decision as "wholly consistent with established principles of labor management relations."<sup>79</sup> Specifically, the majority noted that under § 9 of the Act, a certified union is vested with exclusive representation of the employees within the bargaining unit such that whenever a union employer wishes to take action that would affect the terms and conditions of employment, it must recognize the employees' right to representation.<sup>80</sup> Because an investigatory interview is such an occasion that may result in a change in the terms and conditions of employment, "the application of *Weingarten* in a union setting meshes comfortably with established concepts governing dealings among employees, management, and unions."<sup>81</sup>

Although the Board did not go so far as to claim that the *Weingarten* right grew out of or resulted from § 9, it found that the *Weingarten* right was consistent with § 9 when applied in the union setting.<sup>82</sup> On the other hand, the Board found that when the *Weingarten* right is applied in the nonunion setting, it "wrecks havoc with fundamental provisions of the Act."<sup>83</sup> Just as clearly as an employer of a unionized

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the nonunion setting would only result in more complications that the Court would have wished to avoid. *Materials Research Corp.*, 262 N.L.R.B. 1010 at \*51-52. (Hunter, dissenting).

<sup>75</sup>The *Sears, Roebuck* Board consisted of Chairman Donald Dotson, Member Patricia Diaz Dennis and Member Robert P. Hunter.

<sup>76</sup>*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

<sup>77</sup>*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 at \*3 n.5.

<sup>78</sup>*Id.* at \*3.

<sup>79</sup>*Id.* at \*5.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 at \*5.

<sup>83</sup>*Id.* at \*5.

workforce cannot usually deal with the employees individually, an employer of a nonunionized workforce is totally free to deal with the employees individually.<sup>84</sup>

This argument by the Board in *Sears* brings out more clearly Van De Water's argument that extending *Weingarten* to the nonunion setting exalts the interview setting above other employer/employee encounters. The *Sears* Board stated this most clearly with the following language: "when the Board held in *Materials Research Corp.* that *Weingarten* rights are applicable in a nonunion setting, it told employers, in effect, that they have the right to act on an individual basis with respect to an employee's terms and conditions of employment except for the conduct of an investigatory interview."<sup>85</sup>

The *Sears* Board then refused to accept the "rationalizations" of the *Materials Research* majority as to why a nonunion employer can be required to deal with a *Weingarten* representative. They identified these rationalizations as: (1) the *Weingarten* decision is based on § 7, which extends its protections to represented and unrepresented employees alike and (2) the *Weingarten* representative is not cloaked with full collective-bargaining authority.<sup>86</sup>

The Board rejected the first rationalization by asserting that "[t]he scope of § 7's protection may vary depending on whether employees are represented or unrepresented, and the § 7 rights of one group cannot be mechanically transplanted to the other group at the expense of important statutory policies."<sup>87</sup> In order to illustrate this argument, the *Sears* Board relied on Van De Water's discussion of *Emporium Capwell Co.*,<sup>88</sup> a case in which unionized employees engaged in picketing as an attempt to persuade the employer to deal with them directly rather than through their union representatives.<sup>89</sup> The Supreme Court did not find the employees' actions to be protected in that case because they contravened the exclusivity provisions of § 9, but Van De Water argued that if the same actions were undertaken by nonunion employees, they would be protected.<sup>90</sup> Accordingly, he asserted that § 7 protection does vary between the union and nonunion setting.

The *Sears* Board rejected the second rationalization by asserting that although the *Weingarten* representative cannot engage the employer in collective bargaining, the representative is "dealing with" the employer in that it is acting on behalf of all employees in the bargaining unit and is allowed to speak and present suggestions for discipline. The Board then noted that "dealing with an employer is a primary indicium of labor organization status as well as a traditional union function."<sup>91</sup> This point then leads back to the majority's conclusion that recognizing a *Weingarten*

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<sup>84</sup>*Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974) (holding that an employer generally does not have to recognize a representative of employees in the absence of an election); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>85</sup>*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 at \*6.

<sup>86</sup>*Id.* at \*7.

<sup>87</sup>*Id.* at \*8.

<sup>88</sup>*Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50 (1974).

<sup>89</sup>*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 at \*7.

<sup>90</sup>*Material Resource Corp.*, 262 N.L.R.B. 1010 at \*45 (Van De Water, dissenting).

<sup>91</sup>*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 at \*9.

right in a nonunion setting wreaks havoc with the fundamental principles of the Act because *only* in the union context is an employer required to deal with the employees' chosen representative.<sup>92</sup>

Member Hunter agreed with the majority's conclusion that *Weingarten* should not be extended to the nonunion setting, but he did not agree that such a conclusion is compelled by the Act.<sup>93</sup> Hunter offered a very organized opinion that walked through the Supreme Court's *Weingarten* decision. First, he noted that the Supreme Court limited its analysis simply to whether the *Weingarten* Board's construction of § 7, in terms of it giving union employees the right to union representation at investigatory meetings, was reasonable.<sup>94</sup> Hunter went on to state that the majority in *Materials Research* ignored the Court's self-imposed limits on its decision when it claimed that the rationale of *Weingarten* compelled the same construction of § 7 when analyzing a nonunion employee's right to representation at an investigatory meeting.<sup>95</sup>

Hunter then set forth why he found an extension of *Weingarten* to a nonunion setting to be unreasonable: (1) the decision effectively gave representation to employees who have chosen to not be represented;<sup>96</sup> (2) non-union representatives have neither the knowledge, skill, and experience that a union representative possesses, nor the obligation to represent the interests of the entire bargaining unit;<sup>97</sup> (3) allowing all co-workers to serve as *Weingarten* representatives creates an unlimited pool of representatives who might be emotionally involved.<sup>98</sup>

The next case in the history of NLRB decisions regarding the *Weingarten* right prior to *Epilepsy* is *E.I. DuPont de Nemours and Company* (hereinafter *DuPont*). The *DuPont* decision resulted from a Third Circuit remand decision, *Slaughter v. NLRB*,<sup>99</sup> which analyzed the reasoning of *Sears*. The Third Circuit overturned *Sears* construction of § 7 that prohibited the extension of *Weingarten* to nonunion settings.<sup>100</sup> The court held that it was unreasonable to assert that the Act *must* be interpreted as confining the *Weingarten* right to the union setting, but, the court agreed that § 7 could be interpreted as confining the *Weingarten* right to only union settings: "Had the Board...concluded that § 7 *should* not be interpreted as extending *Weingarten* rights to nonunion employees, that determination would be entitled to deference."<sup>101</sup> Hence, the court remanded the case to the Board.

Based on this Third Circuit directive, the Board held on remand that, although the Act does not totally foreclose the extension, *Weingarten* should not be extended to

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<sup>92</sup>*Id.* at \*10.

<sup>93</sup>*Id.* at \*11 (Hunter, concurring).

<sup>94</sup>*Id.* at \*12 (Hunter, concurring).

<sup>95</sup>*Id.* at \*16-17 (Hunter, concurring).

<sup>96</sup>*Sears, Robuck & Co.*, 274 N.L.R.B. 230 at \*18 (Hunter, concurring).

<sup>97</sup>*Id.* at \*19-20 (Hunter, concurring).

<sup>98</sup>*Id.* at \*20-21 (Hunter, concurring).

<sup>99</sup>*E.I. DuPont de Nemours and Co.*, 289 N.L.R.B. 627 (1988).

<sup>100</sup>*Slaughter v. N.L.R.B.*, 794 F.2d 120, 122 (1986).

<sup>101</sup>*Id.* at 125.

the nonunion setting. The Board's decision in *DuPont* was heavily focused on balancing the "interests of labor and management."<sup>102</sup> The Board concluded that the balance struck by the Supreme Court in *Weingarten* rested on factors that either are not present in the nonunion setting or are not as compelling in the nonunion setting.<sup>103</sup> First, the Board stated that in a nonunion setting, the employee representative has no obligation to represent the interests of the entire unit, and thus, "there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview."<sup>104</sup> Not only does the co-worker not have an obligation to safeguard the interests of all, he may not even have the capability to do so. To begin with, the co-worker would not have access to records of how other employees were disciplined.<sup>105</sup> More importantly, the employer enjoys the freedom to engage in an arbitrary practice of unjust punishment because there is no collective bargaining agreement that defines employee misconduct and the means of dealing with it.<sup>106</sup>

The Board also found that the *Weingarten* decision was based on the skill level of the union representative in terms of eliciting facts and suggesting discipline. The Board contended that the employee representative, in a nonunion setting, is less likely to have skills equivalent to those of a union representative.<sup>107</sup> The Board noted that not only might the employee representative have no experience in dealing with such a situation, but he might also be a friend of the employee he is "representing" and thus be emotionally involved.

The *DuPont* Board drew another distinction between nonunion and union settings that focused on the available forums for addressing grievances. The Board noted the benefit that results from the union representative's successful resolution of the problem at the early stage of the investigatory interview: he prevents the filing of a grievance.<sup>108</sup> This benefit has no value in the nonunion setting where there usually is no enforceable grievance procedure available to an employee. In short, there is no efficiency in preventing something that could never have happened.

Finally, the Board stated that the consequences of an employer denying the employee's request for representation and canceling the interview will be more detrimental in the nonunion setting.<sup>109</sup> In the union setting, the employee's chance to be heard is not totally lost because if the investigatory interview is canceled and discipline ensues, the grievance procedure can be initiated and the employee will be heard in that forum. In the nonunion setting, there usually is no such grievance procedure and if the employer cancels the investigatory interview, the employee may never be heard. Thus, if extending the *Weingarten* right to the nonunion setting

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<sup>102</sup>*E.I. DuPont de Nemours and Co.*, 289 N.L.R.B. 627 at \*6.

<sup>103</sup>*Id.* at \*9.

<sup>104</sup>*Id.* at \*12.

<sup>105</sup>*Id.* at \*12-13.

<sup>106</sup>*Id.* at \*12.

<sup>107</sup>*E.I. DuPont de Nemours and Co.*, 289 N.L.R.B. 627 at \*14.

<sup>108</sup>*Id.* at \*15.

<sup>109</sup>*Id.* at \*16.

causes more interviews to be canceled, such an extension may actually harm the employee according to the Board in *DuPont*.

#### IV. THE BOARD'S DECISION IN EPILEPSY FOUNDATION OF NORTHEAST OHIO

The NLRB's 3-2 decision in *Epilepsy* overturned the twelve year precedent of *DuPont* and once again extended *Weingarten* rights to more than 100 million nonunion workers.<sup>110</sup> The *Epilepsy* Board's three Democratic appointees voted for the extension while the two Republican appointees dissented from the decision.<sup>111</sup>

The NLRB's ruling came out of a case that began in 1996 when an employee of Epilepsy Foundation of Northeast Ohio, Arnis Borgs, brought unfair labor practice charges against his employer following his discharge.<sup>112</sup> The events leading up to the discharge began with Borgs and a co-worker, Ashraful Hasan, writing a memo to their supervisor, Rick Berger, stating that his supervision was no longer needed.<sup>113</sup> A copy of the memo written by Borgs and Hasan was directed to the company's Executive Director, Christine Loehrke.<sup>114</sup> After getting word that Loehrke and Berger were unhappy about the memo, Hasan and Borgs sent a second memo, specifically addressed to Loehrke, that criticized Berger's involvement in the project and cited his inappropriate behavior as the basis for their assertion that his supervision was no longer needed.<sup>115</sup>

Three days after receiving the second memo, Loehrke directed Borgs to meet with Berger and her.<sup>116</sup> Borgs asked Loehrke if he could meet with her alone because he felt intimidated during a prior meeting with Loehrke and Berger.<sup>117</sup> After Loehrke denied this request, Borgs asked if Hasan could be present with him at this meeting. Loehrke refused this request as well.<sup>118</sup> After Borgs' continued opposition to meeting alone with Loehrke and Berger, Loehrke told Borgs to go home for the day and report back the next morning.<sup>119</sup> When Borgs returned the next morning, he met with Loehrke and the company's Director of Administration, Jim Wilson. During this meeting, Loehrke told Borgs that his refusal to meet with Berger and her constituted gross insubordination and Borgs was terminated.<sup>120</sup>

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<sup>110</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428.

<sup>111</sup>Flynn, *supra* note 40, at 1361.

<sup>112</sup>*Epilepsy Found. of Northeast Ohio*, 2000 NLRB LEXIS 428 at \*3.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at \*3.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* at \*4.

<sup>117</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*5. This prior meeting occurred in December, 1995. During this prior meeting, Borgs was "interrogated about his discussions about salary information with other employees" and he was reprimanded for such behavior. *Id.* at \*5 n.5.

<sup>118</sup>*Id.* at \*5.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.* at \*5-6. The termination letter made reference to several other issues, including: (1) the January 17 memo; (2) a failure to build constructive employment relationships with

Borgs filed an unfair labor practice charge against Epilepsy, alleging several § 8(a)(1) violations surrounding his discharge.<sup>121</sup> The Administrative Law Judge (hereinafter ALJ) found that Borgs was terminated for refusing to submit to the investigatory interview without representation,<sup>122</sup> but under the *DuPont* precedent, Borgs had no statutory right to refuse to attend the meeting. Thus, the ALJ determined that Epilepsy's discharge of Borgs did not violate § 8(a)(1) of the Act.<sup>123</sup>

When the matter came before the Board, it recognized that the ALJ was correct in applying the ruling of *DuPont* as the current precedent, but it went on to overrule that precedent and return to the construction of § 7 that extended the *Weingarten* right to the nonunion setting.<sup>124</sup> The *Epilepsy* Board's departure from the twelve-year precedent was grounded on the belief that *DuPont* was inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision and with the purposes of the Act.<sup>125</sup>

The Board's analysis began with two statements made by the Court in *Weingarten*: (1) a union employee's request for representation falls within the literal wording of § 7 of the Act and (2) a union representative safeguards the interests of the entire bargaining unit.<sup>126</sup> The Board read the statements together and concluded that they show how the *Weingarten* right is grounded in the rationale that "the Act generally affords employees the opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees."<sup>127</sup> This conclusion marked the end of the Board's discussion of the *Weingarten* decision and it moved on to a discussion of the post-*Weingarten* Board decisions.

After a brief history of the bottom-line conclusions that the Board had made in *Materials Research*, *Sears*, and *DuPont*, the Board expressed disapproval of the latter two decisions which had refused to extend *Weingarten* to the nonunion setting.<sup>128</sup> The *Epilepsy* Board's disagreement was based on its belief that refusing to extend *Weingarten* misconstrued the language of the Court's decision and

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management and (3) a resistance to accepting responsibility for attempting to attain articulated performance goals. *Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*6 n.6. However, the employer contended that it terminated Borgs for no other reason than his refusal to submit to the interview. *Id.* at \*7 n.7.

<sup>121</sup>An 8(a)(1) unfair labor practice charge alleges that the employer "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158 (1994).

<sup>122</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*7.

<sup>123</sup>*Id.* at \*7.

<sup>124</sup>*Id.* at \*12-13.

<sup>125</sup>*Id.* at \*7. Although *DuPont* was the standing precedent that the majority overruled, the majority made no mistake about the fact that it equally disagreed with the *Sears*, *Roebuck* decision. *Id.* at \*12.

<sup>126</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*8 (citing 420 U.S. 251, 260 (1975)).

<sup>127</sup>*Id.* at \*8-9 (emphasis added).

<sup>128</sup>*Id.* at \*12.



erroneously limited its applicability to the unionized workplace.<sup>129</sup> Rather than elaborating on how those decisions allegedly misconstrued the language of *Weingarten*, the Board discussed why it agreed with the contrasting interpretation of *Weingarten* that allows for the extension of *Weingarten* rights to the nonunion setting.<sup>130</sup> Specifically, the Board agreed with the emphasis that the majority in *Materials Research* had attached to the belief that the *Weingarten* right was grounded in the language of § 7 of the Act.

Beginning with the premises that (1) the right to engage in concerted activities for the purpose of mutual aid or protection is equally applicable in the nonunion setting<sup>131</sup> and that (2) the right to have a coworker present at an investigatory interview greatly enhances the opportunities of nonunion employees to act in concert to address their concern over unjust punishment by the employer,<sup>132</sup> the *Epilepsy* Board concluded that affording *Weingarten* rights to employees in nonunion settings effectuates the policy that § 7 rights are not contingent on union representation.<sup>133</sup>

The *Epilepsy* Board then rejected arguments that had been raised in opposition to extending *Weingarten*.<sup>134</sup> The Board began with the argument that extending *Weingarten* to nonunion settings “wrecks havoc” with provisions of the Act by extinguishing a nonunion employer’s right to deal with its employees individually.<sup>135</sup> In refuting this argument, the *Epilepsy* Board claimed that although a nonunion employer may generally be free to deal with employees on an individual basis, that right cannot be used to mask an obstruction of § 7 rights belonging to the employees.<sup>136</sup> A second argument that the *Epilepsy* Board refuted asserted that a nonunion, co-worker representative would not have the same skills and abilities as a union representative. The *Epilepsy* Board argued that the distinction was not enough to justify limiting the *Weingarten* right to the union setting because not only does the distinction itself rest on speculation as to the skills of a co-worker representative,<sup>137</sup> but also because § 7 rights are not contingent on the skills or motives of the representative in the first place.<sup>138</sup>

The Board also rejected the argument that extending *Weingarten* to the nonunion setting conflicts with the system of exclusive representation established by the Act in the sense that it forces a nonunion employer to “deal with” the equivalent of a labor organization.<sup>139</sup> Conceding, *arguendo*, that (1) a coworker representative could be

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<sup>129</sup>*Id.*

<sup>130</sup>*Id.* at \*12.

<sup>131</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*12-13.

<sup>132</sup>*Id.* at \*12-13.

<sup>133</sup>*Id.* at \*13.

<sup>134</sup>*Id.* at \*14.

<sup>135</sup>*Id.*

<sup>136</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*14.

<sup>137</sup>*Id.* at \*18.

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* at \*16.

characterized as “the equivalent of a labor organization” and (2) the employer is forced to “deal with” the representative during the meeting,<sup>140</sup> the Board concluded that the employer is not being forced to “bargain with” the representative.<sup>141</sup> Furthermore, the Board argued that, because the system of exclusive representation is one of collective bargaining, and not of dealing, the role of the representative cannot be in derogation of the exclusivity principle.<sup>142</sup>

The *Epilepsy* Board ended its opinion by rejecting two further arguments against the extension of *Weingarten*: (1) extending *Weingarten* to nonunion settings may actually work to the detriment of the nonunion employees because employers would be encouraged to simply cancel investigatory interviews<sup>143</sup> and (2) extending *Weingarten* may place an “unknown trip wire” on nonunion employers who are legitimately trying to investigate employee conduct because they will be unaware that their employees have a *Weingarten* right.<sup>144</sup> The *Epilepsy* Board found the first argument to be based on a speculation that “assumes the worst in employer motives,”<sup>145</sup> while it found the second argument to erroneously rest on the belief that ignorance of employee rights can provide a justification for denying those rights.<sup>146</sup>

Member Hurtgen wrote a fairly brief dissenting opinion, in which he stated that not only was the majority’s decision an “abrupt” reversal of precedent, but it also went against the compelling considerations set forth in *DuPont* as to why the *Weingarten* right should not be extended to the nonunion setting.<sup>147</sup> After first conceding that § 7 would provide a nonunion employee with a right to *seek* the assistance of a co-worker at an investigatory interview,<sup>148</sup> Hurtgen assumed, *arguendo*, that a nonunion employer could not fire an employee simply for asking to have a co-worker present during an investigatory interview.<sup>149</sup> However, he argued that the nonunion employee would not have a right to *insist* on representation and that an employer would not violate the Act if it required an employee to attend the interview alone.<sup>150</sup>

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<sup>140</sup>*Id.* at \*16-17.

<sup>141</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*17.

<sup>142</sup>*Id.* at \*16 (The majority made another point regarding the “exclusivity argument.” The majority noted that if one finds a violation of the Act when an employer is *forced* to deal with the equivalent of a labor organization, it must also find a violation of the Act when an employer *voluntarily* deals with the equivalent of a labor organization. The majority found this logic to be strained, but more importantly, irrelevant because the employer is *not* forced to deal with the representative since the employer can always cancel the interview.).

<sup>143</sup>*Id.* at \*19.

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*19-20.

<sup>147</sup>*Id.* at \*37-38 (Hurtgen, dissenting).

<sup>148</sup>*Id.* at \*38 (Hurtgen, dissenting).

<sup>149</sup>*Id.* at \*38-39.

<sup>150</sup>*Id.* at \*39.

Hurtgen's argument that nonunion employees do not have a right to insist on representation during investigatory interviews began with a discussion of how the *DuPont* precedent that disallowed the extension of *Weingarten* was well-grounded in the Supreme Court's focus on the *union representative's* role of safeguarding the interests of all employees in the bargaining unit.<sup>151</sup> He found that the Court's emphasis on the "bargaining unit" and the "union representative" clearly supported the idea that the Court did not envision a *Weingarten* right in the nonunion setting where there is no union representative and no bargaining unit.<sup>152</sup>

Hurtgen then claimed that central differences between the union and nonunion setting should keep the Board from transplanting rights from the union setting to the nonunion setting.<sup>153</sup> These differences are: (1) the union employer acts at its peril when he deals directly with an employee regarding an employment related matter, while the nonunion employer is completely free to deal with individual employees as he wishes and (2) in a union setting, the representative may actually help the interview process because of his knowledge of the discipline provisions of the collective-bargaining agreement and the grievance-arbitration provisions, while there is neither a collective bargaining agreement nor a grievance arbitration procedure in the nonunion setting.<sup>154</sup>

Hurtgen then asserted that the Supreme Court struck a delicate balance between labor and management interests in its *Weingarten* decision by looking at the following factors:<sup>155</sup> (1) the union representative's interest in representing all of the unit employees; (2) the expertise and special knowledge of the union representative, and (3) the industrial practice of many collective-bargaining agreements containing "*Weingarten*-like" provisions.<sup>156</sup> Hurtgen concluded that the *Epilepsy* Board's decision altered the balance struck by the Court because none of these factors are present on the nonunion setting.<sup>157</sup>

Finally, as noted earlier, Hurtgen argued that the majority's decision placed an unknown trip wire on nonunion employers because many or most nonunion employers would not be aware of the *Weingarten* right.<sup>158</sup>

Member Brame, the *Epilepsy* Board's other Republican appointee, took a stronger dissenting position than Hurtgen when he claimed that the Act *compelled* the conclusion that *Weingarten* rights do not extend to nonunion employees.<sup>159</sup>

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<sup>151</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*39 (Hurtgen, dissenting).

<sup>152</sup>*Id.* at \*39-40 (Hurtgen, dissenting).

<sup>153</sup>*Id.* at \*40.

<sup>154</sup>Hurtgen qualified this latter distinction by noting that he was not characterizing nonunion representatives as unintelligent, he was simply noting that they would not offer the same insights as a union representative.

<sup>155</sup>*Id.* at \*41-42.

<sup>156</sup>*Id.* at \*42.

<sup>157</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*42.

<sup>158</sup>*Id.* at \*42-43.

<sup>159</sup>*Id.* at \*95.

Echoing Van de Water's dissent in *Materials Research*,<sup>160</sup> Brame found that extending *Weingarten* forces a nonunionized employer to deal with an employee representative without that representative having achieved recognitional status.<sup>161</sup> Brame found this situation to conflict with the general rule that in the absence of recognitional status, a nonunion employer is free to deal with the employees on an individual basis with regard to *all* terms and conditions of employment.<sup>162</sup> Continuing the argument of Van de Water, Brame contended that requiring the employer to recognize a representative in only one setting (i.e. disciplinary interviews) that affects terms and condition of employment is "completely at odds with the intent and structure of the Act."<sup>163</sup>

After arguing that the Act compels a conclusion that *Weingarten* does not extend to the nonunion setting, Brame argued that, at the very least, such a conclusion is the best approach as a discretionary matter.<sup>164</sup> In response to the majority's argument that it is "wholly speculative" to claim that nonunion employees are less qualified than a union representative for the role of a *Weingarten* representative, Brame claimed that it is wholly speculative to assume that a lone individual, selected on the spur of the moment, would indeed advance the interests of all the employees and be helpful throughout the interview.<sup>165</sup>

Brame also argued that a "practical reason" for not extending *Weingarten* to the nonunion setting is that the co-worker representative would not have the same incentive as a union representative to look out for the wider interests of the rest of the workforce.<sup>166</sup>

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<sup>160</sup>*Id.* at \*95. In other words, § 7 cannot be interpreted to allow unrepresented employees the right to representation in one isolated context.

<sup>161</sup>*Id.*

<sup>162</sup>*Id.* It should be noted that the majority did address this particular argument made by Brame. However, the majority seemed to mischaracterize the argument. The majority claimed that Member Brame was arguing that an extension of *Weingarten* to the nonunion setting forced an employer to "deal with" the equivalent of a labor organization and that this conflicted with the exclusivity principle of § 9(a) of the Act. Brame's reference to § 9 appeared in a footnote that he used to support his contention that a nonunionized employer is under no duty to recognize an employee representative *until that representative is certified*. The footnote stated that under § 9(a) of the Act, an employer is obligated to bargain with representatives of employees, as opposed to the individual employees, once those representatives have been certified. Thus, it seems to be a mischaracterization to state that Brame found extension of *Weingarten* to conflict with the exclusivity principle. It seems that Brame contended that extending *Weingarten* conflicts with the employer's right to deal individually with employees up to the point that a union is recognized because it is only once a union is recognized that the exclusivity principle, which requires an employer to deal with representatives, is triggered.

<sup>163</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*95.

<sup>164</sup>*Id.* at \*99.

<sup>165</sup>*Id.* at \*99-100.

<sup>166</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*101 (Brame, dissenting).

Again attacking the majority for labeling such a fear as speculative, Brame claimed that the mere likelihood that a co-worker would indeed act with the interests of all employees at hand does not overcome the fact that the interests of all are much more likely to be safeguarded in the unionized setting.<sup>167</sup> As a final blow to the majority's discounting the *DuPont* fears as speculative, Brame asserted that such a characterization flies in the face of the Supreme Court's *Weingarten* decision<sup>168</sup> because the Court in *Weingarten* found both the expertise of the union representative and his duty to protect the interests of all employees to be important in balancing the interests of labor and management.

#### V. THE EXTENSION OF *WEINGARTEN* TO THE NONUNION SETTING FAILS TO SATISFY SECTION 7 IN TWO RESPECTS

Part V traced the conflicting Board decisions that have tackled the issue of whether *Weingarten* should be extended to the nonunion setting. This section will first look at whether the debate over extending *Weingarten* turns on § 7 or § 9. After concluding that *Weingarten* rights are grounded in § 7, the analysis will turn to whether exercising *Weingarten* rights in the nonunion setting satisfies the elements of § 7.

Some of the conflict amongst the post-*Weingarten* Board decisions rests on disagreement over the threshold issue of whether the *Weingarten* right is grounded in § 7 or § 9 of the NLRA. Van de Water, in his dissenting opinion in *Materials Research*, first raised the argument that the *Weingarten* right was grounded in § 9 of the NLRA. The bottom line of Van de Water's argument is that: (1) § 9(a) establishes the union as the exclusive representative of the employees; (2) §§ 8(a)(1) and (a)(5) prohibit employer interference with the employees' right to bargain through that exclusive representative; and (3) an investigatory interview is a setting in which a union employee has a right to be represented by his union representative. If Van de Water is correct, there is no hope of extending *Weingarten* to the nonunion setting that lacks an exclusive representative.

However, Van de Water's perspective is not consistent with the Supreme Court's language that clearly shows that it protected a union employee's right to representation during investigatory interviews under § 7 and not § 9: "The action of an employee seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7."<sup>169</sup> Furthermore, the Supreme Court stated that a *Weingarten* representative does not act in a collective bargaining capacity<sup>170</sup> and § 9 only designates the union as the exclusive representative "for purposes of collective bargaining." Thus, § 9 is irrelevant to the *Weingarten* scenario.

Because the Court protected the *Weingarten* right under § 7, as opposed to § 9, the only way to justify extending the right to the nonunion setting is to show that § 7

<sup>167</sup>*Id.* at \*101 (Brame, dissenting).

<sup>168</sup>*Epilepsy Found. of Northeast Ohio*, 2000 N.L.R.B. LEXIS 428 at \*101 (Brame, dissenting).

<sup>169</sup>*J. Weingarten, Inc.*, 420 U.S. at 260.

<sup>170</sup>"The employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." *J. Weingarten, Inc.*, 420 U.S. at 260.

protection would be equally applicable there despite the lack of a union. The clearest way of analyzing whether an action is protected under § 7 is to tease out the statute's elements—concertedness, mutuality, and means—and determine whether each element is individually satisfied.<sup>171</sup> The Court's *Weingarten* decision focused on the first two elements, which come directly out of the statutory language.<sup>172</sup> The means element, which has been read into the statute, is irrelevant to this discussion because there is no argument that requesting representation is an impermissible form of employee activity.

#### A. Concertedness

The phrase “concerted activities” has a very broad meaning for purposes of § 7 because of the Court's determination that “the language of § 7 does not confine itself to such a narrow meaning that it applies only to a situation in which two or more employees are working together at the same time and same place toward a common goal.”<sup>173</sup> This broad interpretation has created two categories under which concerted activity may fall: (1) “classic concerted” activity in which two or more employees act together and (2) “deemed concerted” activity in which the actions of an individual employee are so closely linked to those of other employees that they can be recognized as concerted. The *Weingarten* scenario is a type of deemed concerted activity because it involves only one employee asserting a right (i.e. only the employee being investigated requests the presence of a representative).<sup>174</sup>

Given the Supreme Court's *N.L.R.B. v. City Disposal Sys., Inc.* (hereinafter *City Disposal*) opinion, which established § 7 protection for a single employee's actions that grow out of a collective bargaining agreement, it seems indisputable that there is concerted activity in one union employee's request for union representation during an investigatory meeting. However, the following analysis will set forth a two-point argument as to why a nonunion employee's request for representation during an investigatory interview is not concerted activity. First, the logic of *City Disposal* fails in the nonunion setting. Second, the rationale that the single employee's request for representation protects the interest of all employees also fails in the nonunion setting.

In *City Disposal*, a union employee relied on a collective bargaining provision when he refused to drive a malfunctioning truck.<sup>175</sup> The Court found the employee's

<sup>171</sup>This analytical scheme was endorsed by Charles J. Morris. See *supra* note 7. Although these three elements should be viewed as separate and independent of each other, the justifications for finding each element in a particular action will often overlap.

<sup>172</sup>The requirement of reasonable means has been read into the statute so as to prevent illegal or disloyal behavior from being protected under section 7 simply because it is concerted and for mutual aid or protection. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962).

<sup>173</sup>*N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984).

<sup>174</sup>The fact that the right being asserted requests the presence of another does not place this scenario in the category of classic concerted activity because it remains that there is only one employee asserting the right.

<sup>175</sup>The collective bargaining agreement provision relied on stated: “The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliance prescribed by law.” 465 U.S. at 824-25.

refusal to drive the truck to be concerted activity because “the invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the [collective] process that gave rise to the agreement.”<sup>176</sup> “A lone employee’s invocation of a right grounded in his collective-bargaining agreement is...a concerted activity in a very real sense.”<sup>177</sup>

Likewise, when, as in *Weingarten*, a single union employee seeks the assistance of his union steward during an investigatory interview, he is extending the collective activity that voted in the union and negotiated the collective-bargaining agreement.<sup>178</sup> It should be noted that *City Disposal* spoke specifically to the narrow situation of a lone employee asserting an explicit right contained in the collective bargaining agreement.<sup>179</sup> The *Weingarten* scenario is one step removed from *City Disposal* because it involves the invocation of the aid of a union steward rather than the invocation of a particular right listed in the collective bargaining agreement.<sup>180</sup> Nevertheless, the bottom line of *City Disposal* was that the action of the individual was closely enough related to the prior collective bargaining activity such that neither would have been complete without the other.<sup>181</sup> Surely, the voting in of a union would be incomplete without the employees being able to invoke its help and the request for a union steward would be impossible without first voting in a union. Accordingly, the action of the employee requesting the help of the union representative is closely enough linked to the actions of other employees that it is deemed to be concerted activity.

*City Disposal* represents the strongest argument in favor of finding concertedness in the exercise of the *Weingarten* right in the union setting. However, this argument has no applicability in the nonunion setting where there is no concerted activity leading to either a union or collective-bargaining agreement. Thus, it is impossible for a single nonunion employee’s request for the presence of a fellow employee during an investigatory interview to be an outgrowth of any concerted activity. Therefore, if a nonunion employee’s exercise of the *Weingarten* right is going to be protected by § 7, the invocation of the right itself will have to be concerted, without reference to any prior concerted activities.

The Supreme Court’s *Weingarten* decision did not apply the logic of *City Disposal* to its analysis of the concerted nature of a union employee’s request for representation because *Weingarten* was decided years before *City Disposal*. Rather, the Court emphasized the fact that the union representative safeguarded the interests of all the employees in addition to the individual employee being interviewed.<sup>182</sup>

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<sup>176</sup>*Id.* at 831.

<sup>177</sup>*Id.* at 832.

<sup>178</sup>*Id.* at. 822 (1984).

<sup>179</sup>*City Disposal Sys., Inc.*, 465 U.S. at 827. It should be noted that although the right asserted by the employee in *City Disposal* was contained in the collective bargaining agreement, the employee, when asserting that right, did not refer to the specific provision of the collective bargaining agreement. *Id.*

<sup>180</sup>*J. Weingarten, Inc.*, 420 U.S. at 254.

<sup>181</sup>*City Disposal Sys., Inc.*, 465 U.S. at 833.

<sup>182</sup>Although the statutory duty to provide fair representation (§301) is only triggered in collective bargaining situations the union always has the threat of being voted out to keep it in

This can lead to a finding of concertedness under the theory that the individual employee asserting the *Weingarten* right in the union setting can be viewed as initiating a process that will benefit all employees due to the role of the union representative.<sup>183</sup> Furthermore, the outcome of the interview will indeed affect all the employees because almost all collective bargaining agreements have a “just cause” provision that prohibits the employer from imposing discipline without just cause and if an employer arbitrarily disciplines the employees, he will be deemed to be acting without just cause. Thus, when the union representative, acting with the interests of all, helps to reach a pro-employee result, the process benefits all the employees.

The Supreme Court’s rationale of finding concertedness in the exercise of the *Weingarten* right in the union setting cannot be applied in the nonunion setting because although the nonunion *Weingarten* representative *may* represent the interests of all employees, there is no guarantee that he will do so. More importantly, even if the representative acts for the interests of all, it will be inconsequential because the outcome of the meeting will not affect the other employees given that nonunion employers are free to act arbitrarily in disciplining employees due to the lack of a collective bargaining agreement with a just cause provision. With the outcome of the meeting having no bearing on the other employees (not necessarily, anyway), it cannot be said that the employee asserting the *Weingarten* right in the nonunion setting is initiating a process that will necessarily benefit the employees generally.

For example, assume that the nonunion representative is asked to assist an employee who is being investigated for an infraction that the representative knows is also being committed by several other employees.<sup>184</sup> Assume further that the representative is competent and not emotionally involved in the matter. The representative then does his best to urge the employer to impose a light punishment since he knows that several other employees will probably be brought up on the same charge and he is looking out for all of them. Under this hypothetical, the nonunion representative has indeed considered the interests of all employees, but it may very well become inconsequential for the next employee who is brought up on the same charge. The employer may have imposed the light punishment on the first employee because he did not realize how many employees were committing this infraction or he may have favored that employee for some reason. Regardless of his motivation, the employer is free to impose much harsher punishments on the subsequent employees. Thus, when all is said and done, even though the nonunion representative *may* act with the interests of all employees at hand, this possibility is no assurance that the *Weingarten* interview will be a process that benefits all, as it is in the union setting.

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check. Thus, despite the Court making it clear that the *Weingarten* scenario is not one of collective bargaining, the *Weingarten* representative would still have a duty of fair representation hanging over him because if the employees feel that the union is not adequately representing them, they can vote the union out.

<sup>183</sup>Morris, *supra* note 7, at 1703. “A presumption [with regard to concertedness] should arise . . . if the single employee’s activity initiates a process that is intended to benefit [all] employees generally.” *Id.*

<sup>184</sup>This surely is an assumption because there is no guarantee that a co-worker, as opposed to a union representative will know about all the things going on with regard to all the employees.



In the end, *City Disposal's* persuasive argument for why the assertion of the *Weingarten* right in the union setting is concerted has absolutely no bearing on protecting the same right in the nonunion setting because that argument is contingent on the presence of a duly elected union. Additionally, the rationale that exercising the *Weingarten* right in the union setting is concerted because it protects the interests of all employees is not found in the nonunion setting where there is no guarantee that the presence of a representative will benefit all employees.

Moving on to the second facet of § 7 protected activity, it must be analyzed whether exercising the *Weingarten* right in the nonunion setting aids or protects other employees. This discussion will set forth an argument as to why the Supreme Court's rationale for finding mutual aid or protection when *Weingarten* rights are exercised in the union setting cannot be transferred to the nonunion setting.

The Supreme Court justified protecting, under § 7, the exercise of the right to representation at investigatory meetings in the union setting because it assured other employees that they also can have representation if they are called into an investigatory interview.<sup>185</sup> This assurance grows out of the duty of fair representation that binds unions. Under this doctrine, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."<sup>186</sup> Thus, once one union employee is provided with representative during an investigatory interview, all the other employees are assured of the same benefit if they request it.

This notion of assurance cannot be transplanted to the nonunion setting, where nonunion employees have absolutely no obligation to represent each other, explicitly or implicitly. Furthermore, nonunion employees do not even have much of an incentive to represent each other because they have nothing to lose by refusing to do so. Any incentive to serve as a *Weingarten* representative would seemingly be based on the popularity of the individual invoking the right or the popularity of the underlying reason for which the meeting was called (i.e. is the employee seeking a representative one who other employees would want to help and/or is the matter for which the employee is being investigated one of interest to the other employees). Beyond a nonunion employee having little incentive to serve as a *Weingarten* representative, he may have something to lose if his serving as a *Weingarten* representative would irritate the employer. The bottom line is that without an overarching obligation, the fact that one employee had a *Weingarten* representative provides no comfort to the other employees.

Furthermore, as discussed earlier,<sup>187</sup> because of the just cause provisions in collective bargaining agreements, the outcome of an investigatory meeting in the union setting affects all employees of the employer. Under this scheme, the individual employee's action of asserting his *Weingarten* right benefits the interests of other employees because the outcome of the meeting will establish precedent and the other employee's would want a union representative present to hopefully shape that precedent.

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<sup>185</sup>*J. Weingarten, Inc.*, 420 U.S. at 260.

<sup>186</sup>*Vaca v. Sipes*, 87 S. Ct. 903, 910 (1967).

<sup>187</sup>*See supra* page 44.

In contrast, in the nonunion setting, as explained in the discussion of concertedness, not only does the co-worker representative have no obligation to protect the interests of the other employees, but the outcome of the meeting will not even affect the other employees because the employer can act in an arbitrary manner. The employer could discipline another employee in a totally different manner for the same offense due to the lack of a just cause requirement such that the later employee, in a similar situation as the first, finds no comfort in how the employer handled the first. Rather than there being a close relationship between the individual employee exercising the *Weingarten* right and the interests of the other employees, there is a complete disconnect.

In the end, exercising the *Weingarten* right in the nonunion setting fails to constitute activity carried out for the mutual aid or protection of others. The Supreme Court's rationale for finding mutual aid or protection in *Weingarten* is inapplicable in the nonunion setting where the fact that one nonunion employee was able to have a co-worker present at an investigatory meeting provides no assurance to other nonunion employees that they could have the same. Furthermore, the rationale that all benefits attained by a union representative for one employee in an investigatory interview extend to the other employees via the "just cause provision" in the collective bargaining agreement is inapplicable in the nonunion setting. Nonunion employees do not reap the benefits that a co-worker representative might achieve for an employee in an investigatory interview because the employer can discipline in an arbitrary manner.

#### VI. THE D.C. CIRCUIT'S UPHOLDING OF EPILEPSY

Just last November, the U.S. Court of Appeals for the D.C. Circuit upheld the Board's *Epilepsy* decision to extend *Weingarten* rights to the nonunion setting.<sup>188</sup> The court's opinion does not require much analysis, as it amounts to a *Chevron* deference.<sup>189</sup> Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, (hereinafter *Chevron*), if a statute is silent or ambiguous on an issue, the agency that administers the statute may resolve the issue, and deference must be given to such resolution so long as it reflects a reasonable interpretation of the statute.<sup>190</sup> Under *Chevron*, the duty to give deference is only triggered if the statute itself is not clear on the issue decided by the agency.<sup>191</sup> Thus, because the D.C. Circuit jumped right into analyzing whether the *Epilepsy* Board's decision was reasonable under the Act, it must have assumed that the language of § 7 is not clear as to whether *Weingarten* rights can be extended to the nonunion setting. However, the D.C. Circuit did not set forth an analysis of § 7 itself.

The D.C. Circuit found reasonable the Board's conclusion that: (1) the presence of a nonunion co-worker in an investigatory interview is concerted and for mutual aid or protection<sup>192</sup> and (2) the extension of *Weingarten* to the nonunion setting is not

<sup>188</sup>*Epilepsy Found. of Northeast Ohio*, 268 F.3d at 1095.

<sup>189</sup>The term "*Chevron* deference" comes from the U.S. Supreme Court case, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>190</sup>467 U.S. at 842-43.

<sup>191</sup>*Id.*

<sup>192</sup>*Epilepsy Found. of Northeast Ohio*, 268 F.3d at 1099.

at odds with § 9 of the NLRA.<sup>193</sup> The court briefly set forth two points in support of its determination that it was reasonable for the Board to find concertedness and mutuality in the exercise of *Weingarten* rights in the nonunion setting: (1) the Board's position recognized that nonunion employees, as well as union employees, have a shared interest in preventing unjust punishment and the presence of a co-worker in an investigatory interview will help prevent unjust punishment<sup>194</sup> and (2) it is within the province of the Board and not the courts to determine if a *Weingarten*-type rule is appropriate in the nonunion setting in light of changing industrial practices.<sup>195</sup>

In support of its determination that it was reasonable for the Board to find that extending *Weingarten* to the nonunion setting does not conflict with § 9 of the NLRA, the D.C. Circuit simply reiterated the Board's answer to the issue.<sup>196</sup> The D.C. Circuit agreed with the Board's conclusion that there is no conflict because § 9's system of exclusive representation is one of collective bargaining, not one of dealing, and the employer is under no duty to bargain with the *Weingarten* representative.<sup>197</sup>

There was one issue on which the D.C. Circuit did not defer to the Board's conclusion. The D.C. Circuit found that the Board erred in giving retroactive effect to its new interpretation of § 7.<sup>198</sup> In declining to enforce the Board's decision on retroactivity, the D.C. Circuit noted that the governing principle is that "when there is a substitution of new law for old law," it can only be applied prospectively "in order to protect the settled expectations of those who relied on the preexisting rule."<sup>199</sup>

Finally, the D.C. Circuit noted that the Board's conclusion to extend *Weingarten* to the nonunion setting obviously is debatable, but the rationale underlying the conclusion is both clear and reasonable.<sup>200</sup> Thus, the D.C. Circuit did not say that the Board's *Epilepsy* decision was compelled by the Act—it simply said that it is a reasonable interpretation of the Act.

## VII. CONCLUSION

The issue of whether nonunion employees have a statutorily protected right to representation at an investigatory meeting has been ongoing for almost thirty years and it will probably continue to be debated until the Board and appellate courts

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<sup>193</sup>*Id.* It should be noted that on appeal, the Epilepsy Foundation argued that the Board's decision violated nonunion employers' First Amendment right to speak individually with his or her employees. *Id.* The D.C. Circuit did not address this argument because it was not raised with the Board. *Id.* at 1101.

<sup>194</sup>*Epilepsy Found. of Northeast Ohio*, 268 F.3d at 1100.

<sup>195</sup>*Id.*

<sup>196</sup>*Id.* at 1101.

<sup>197</sup>*Id.* at 1100-01 (quoting 2000 N.L.R.B. LEXIS 428 at \*16). *See also* *Slaughter v. NLRB*, 794 F.2d 120, 127 (3rd Cir. 1986).

<sup>198</sup>*Epilepsy Found. of Northeast Ohio*, 268 F.3d at 1102.

<sup>199</sup>*Id.* (citing *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)).

<sup>200</sup>*Id.* at 1102.

undertake a focused analysis of whether § 7 allows such a right. The approach the Board has adopted with regard to this issue has produced conflicting opinions because the Board has rested its decisions on areas open to debate. Examples of such areas include the practical repercussions of an extension, the tilt in the balance between employees and employers, and the skill level of a union representative compared to a nonunion representative. A focused analysis of the established elements of § 7 would provide a more hard line outcome that would be upheld and maintained with greater success. Nevertheless, as history indicates, the Board decisions will often mimic the political party that composes the Board majority.<sup>201</sup>

Perhaps the best guess as to why the § 7 analysis is lacking is because such an analysis would lead to the conclusion that exercising *Weingarten* rights in the nonunion setting cannot be protected under § 7. In the absence of the union steward's broad purposes to look out for the interests of all employees and in the absence of a collective bargaining agreement to link the action of the single employee to group activity, there can be no showing of concertedness and mutuality.

Despite its failure to show the presence of the statutory requirements, the *Epilepsy* Board overruled its twelve year precedent that confined the *Weingarten* rights to the union setting where all of the elements of § 7 protection are found. The *Epilepsy* Board's decision is contrary to the Act—it is an impermissible reading of § 7—and thus, it is not entitled to deference under *Chevron*. However, the D.C. Circuit, in similar fashion to the Board decisions following *Weingarten*, skipped over a detailed analysis of § 7, and found the Board's decision to be reasonable. Nevertheless, the D.C. Circuit decision does not put the issue to rest because it did not find that the extension was mandated by the Act, only that it was reasonable under the Act. Thus, the new Republican Board<sup>202</sup> could reverse the matter again.

A quote from one of the dissenting justices in *Weingarten* seems to be rather appropriate to the subsequent history that followed the seminal case in this area of labor law:

The tortured history and inconsistency of the Board's efforts in this difficult area suggest the need for an explanation by the Board of why the new rule was adopted. However, a much more basic policy demands that the Board explain its new construction. The integrity of the administrative process requires that "[when] the Board so exercises the discretion given to it by Congress, it must disclose the basis of its order and give indication that it has exercised the discretion with which Congress has empowered it."<sup>203</sup>

SARAH C. FLANNERY<sup>204</sup>

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<sup>201</sup>See Appendix.

<sup>202</sup>The current Board includes three Republicans: Peter Hurtgen (former management attorney); Michael Bartlett (former management attorney) and William Cowen (former management attorney). All are recess appointees of President Bush. The fourth member is a democrat, Wilma Liebman, an appointee of former President Clinton.

<sup>203</sup>*J. Weingarten, Inc.*, 420 U.S. at 269 (C.J., Burger, dissenting).

<sup>204</sup>The author would like to thank Professor Joan Flynn for her assistance with the drafting and editing of this note.

APPENDIX<sup>1</sup>Post- *Weingarten* Board Decisions<sup>2</sup>

<i>Weingarten</i> right should be extended to the nonunion setting	<i>Weingarten</i> right should not be extended to the nonunion setting
<i>Materials Research</i> , 262 NLRB 1010 (1982). 3-2 vote Majority: Fanning (Eisenhower) (Dem.) Jenkins (Kennedy) (Rep.) Zimmerman (Carter) (Ind.) Minority: Van de Water (Reagan) (Rep.) Hunter (Reagan) (Rep.)	
	<i>Sears, Roebuck</i> , 274 NLRB 230 (1985). 3-0 vote Dotson (Reagan) (Rep.) Dennis (Reagan) (Dem.) Hunter (Reagan) (Rep.)
	<i>E.I. DuPont</i> , 289 NLRB 627 (1988) 4-0 vote Stephens (Reagan) (Rep.) Johansen (Reagan) (Rep.) Babson (Reagan) (Dem.) Cracraft (Reagan) (Dem.)
<i>Epilepsy Foundation</i> , 2000 NLRB LEXIS 428 3-2 vote Majority: Truesdale (Clinton) (Dem.) Fox (Clinton) (Dem.) Liebman (Clinton) (Dem.) Minority: Hurtgen (Clinton) (Dem.) Brame (Clinton) (Dem.)	

<sup>1</sup>Data taken from Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361 (2000) (appendix); National Labor Relations Board Members, at <http://www.nlr.gov/members.html> (last visited April 28, 2002).

<sup>2</sup>Key: Parens following Board Member's name indicates the President who appointed the Member and the Member's political party affiliation.